

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUAN PAYNE,)
)
 Petitioner,)
)
 v.) No. 4:02 CV 1246 RWS
) DDN
 MICHAEL L. KEMNA,)
)
 Respondent.)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court upon the petition of Missouri state prisoner Juan Payne for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b).

I. PROCEDURAL BACKGROUND

On April 30, 1996, Payne was found guilty by a jury in the Circuit Court of the City of St. Louis of murder in the second degree and armed criminal action. (Doc. 6 Ex. A at 80-81.) On August 9, 1996, he was sentenced to concurrent terms of life imprisonment. (Id. at 174-76.)

Thereafter, on August 12, 1996, Payne filed a notice of appeal to the Missouri Court of Appeals. (Id. at 177-78.) On October 14, 1997, the Missouri Court of Appeals affirmed the judgment. (Id. Ex. H at 3); State v. Payne, 958 S.W.2d 561 (Mo. Ct. App. 1997). On April 6, 1998, petitioner filed his first post-conviction relief motion under Missouri Supreme Court Rule 29.15. (Id. Ex. I at 2.) The circuit court, following an evidentiary hearing, denied the Rule 29.15 motion on December 28, 1998. (Id. at 14-22.) On December 28, 1999, the Missouri Court of Appeals issued its

opinion, affirming in part, and reversing and remanding in part to the Rule 29.15 hearing court for supplemental findings and conclusions. (Id. Ex. N.) On June 14, 2000, the circuit court issued its supplemental opinion denying relief. (Id. Ex. T Attach. at 4.) On June 5, 2001, the Missouri Court of Appeals issued a per curiam opinion ultimately affirming the judgment against petitioner. (Id. Exs. T, U at 3.) On August 13, 2001, the Missouri Court of Appeals issued its mandate confirming its June 5 denial of petitioner's Rule 29.15 motion. (Doc. 7 Ex. A.)

In his § 2254 petition, filed through counsel on August 15, 2002, Payne seeks federal habeas relief on three grounds:

- (1) his convictions violate his Fifth, Sixth and Fourteenth Amendment rights because petitioner was denied the right to confront witnesses;
- (2) his Fifth, Sixth and Fourteenth Amendment rights were violated by trial counsel's failure to accede to petitioner's request to testify in his own defense; and
- (3) his Fifth, Sixth and Fourteenth Amendment rights were violated by trial counsel's failure to present available evidence to support petitioner's claimed alibi defense.

(Doc. 1.)

Respondent argues that petitioner did not commence this action within the one-year limitations period provided by 28 U.S.C. § 2244(d). According to respondent, that period began June 5, 2001, when the Missouri Court of Appeals issued its opinion affirming the denial of the Rule 29.15 motion. (Doc. 6 at 7.) Petitioner, in turn, argues that the one-year period did not begin to run until the mandate was issued on August 13, 2001. He also argues that, although his § 2254 petition was file-stamped on August 15, 2002, he in fact filed it on August 13, 2002, and that 9 days must be added to the August 13, 2002 deadline because he "had 9 days remaining between the conclusion of his state direct

appeal and the time he filed his postconviction motion in which to file a writ of certiorari with the United States Supreme Court." (Doc. 7 at 3, 8-9.)

II. DISCUSSION

In pertinent part § 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;^[1]

* * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (1) (A), (2).

In Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998), cert. denied, 525 U.S. 1187 (1999), the Eighth Circuit held that the running of the statute of limitations for § 2244(d) (1) (A) purposes is triggered by either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ.

¹Section 2244(d) (1) lists three other alternative events which may trigger the limitations period. Those other alternatives are not at issue in this case.

Ninety days is allotted for filing a petition for a writ of certiorari. See U. S. Sup. Ct. R. 13.1 (1999), foll. 28 U.S.C.A. Unlike § 2244(d)(1), § 2244(d)(2) does not toll the statute of limitations for the 90-day period during which a petition for a writ of certiorari may be filed. See Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001).

Thus, the first 90 days after the Missouri Court of Appeals affirmed petitioner's direct appeal on October 14, 1997, do not count toward the 1-year statute of limitations. That 90-day period ended on January 12, 2001. By the time petitioner filed his Rule 29.15 motion (April 6, 2001), 83 days of his one-year period for filing his § 2254 petition had passed (from January 13 to April 6).

It is unnecessary to resolve the parties' dispute over whether the issuance of the June 5, 2001 opinion by the Missouri Court of Appeals, as opposed to the August 13, 2001 mandate by the Missouri Court of Appeals re-triggered the running on the one-year limitations periods.² Even if the latter date applied, the § 2254 petition is untimely because it was due on May 22, 2002, which was 282 days (365-83) after August 13, 2001.³ Even crediting petitioner with a filing date of August 13, 2002, he was out of time for commencing this action.

For these reasons,

²Compare Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that under Florida law the issuance of the mandate on direct appeal makes a criminal judgment final, and that that date will be used for § 2244(d)(1)(A) purposes), with Wixom v. Washington, 264 F.3d 894, 897-98 (9th Cir. 2001) (rejecting for purposes of § 2244(d)(1)(A) the use of a Washington state law which views issuance of the mandate as making a conviction final), cert. denied, 534 U.S. 1143 (2002).

³It is unnecessary to address petitioner's arguments as to the additional few days to which he claims entitlement, as those days are far less than the 81 days that passed between May 24 and August 13, 2002.

IT IS HEREBY RECOMMENDED that the habeas petition of Juan Payne be denied.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to timely file written objections may result in the waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of August, 2003.